SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

No. 73-389

In the Supreme Court of the United States

OCTOBER TERM, 1973

MORRIS JOHNSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted of having distributed heroin in violation of 21 U.S.C. 841(a)(1). He was sentenced to imprisonment for ten years. The court of appeals affirmed on July 24, 1973 (Pet. App.). The petition was not filed until August 27, 1973, and is thus untimely under Rule 22(2) of the Rules of this Court.

Petitioner contends that he was denied his right to trial by an impartial jury by the inclusion of jurors on his panel who sat in previous cases where the same government witnesses testified against other persons charged with similar but independent crimes. As the court of appeals pointed out, however, in an opinion upon which we rely, petitioner made no effort at trial to have pro-

spective jurors stricken from the jury panel for cause, did not establish that any of the jurors who sat in previous narcotics cases involving the same government witnesses were actually prejudiced against him, and did not complain that the voir dire was in any way inadequate. Indeed, defense counsel affirmatively passed the jury for cause (Supp. Tr. 21). A juror is not disqualified merely because he has previously served in a similar case where the same witness testified on behalf of the government. See *United States* v. *Tropeano*, 476 F. 2d 586 (C.A. 1), certiorari denied, October 9, 1973 (No. 72-6693); *United States* v. *Ragland*, 375 F. 2d 471, 475-476 (C.A. 2), certiorari denied, 390 U.S. 925. The credibility of the government witnesses in each case was tested under different circumstances and against different facts. Petitioner's *per se* attack on the composition of the jury panel was properly rejected by the courts below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.